

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOJO DEOGRACIAS EJONGA,

Plaintiff,

v.

CHERYL STRANGE; MICHAEL  
OBENLAND; ERIC JACKSON; JOHN  
DOE; CAROL SMITH; JANE DOE;  
JACK WARNER; LEE STEMLER; ALEX  
WANTANBE; ARBEN KULLOJKA; JON  
DOE,

Defendants.

CASE NO. 2:21-cv-01004-RJB-GJL

ORDER ADOPTING REPORT AND  
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge Grady J. Leupold. Dkt. 154. The Court has considered the Report and Recommendation, Defendants' Objections to the Report and Recommendation, Plaintiff's Response to the Objections, and the file herein.

**A. BACKGROUND AND REPORT AND RECOMMENDATION**

On July 27, 2021, the Plaintiff, a *pro se* prisoner, filed this civil rights case pursuant to 42 U.S.C. § 1983. Dkt. 1. On September 14, 2023, the Report and Recommendation was filed,

1 recommending that Defendants' motion for summary judgment (Dkt. 131) be denied as to the  
2 Plaintiff's First Amendment retaliation claim against Defendant Alex Watanabe, a prison  
3 grievance coordinator, and granted in all other respects. Dkt. 154. The facts and procedural  
4 history are in the Report and Recommendation (Dkt. 154) and are adopted here. Defendants'  
5 objections relate to the Plaintiff's First Amendment retaliation claim only. Dkt. 155.

#### 6 **B. PLAINTIFF'S FIRST AMENDMENT RETALIATION CLAIM**

7 The Plaintiff's First Amendment retaliation claim arises from a kiosk message from  
8 Plaintiff. For ease of reference, the facts related to this claim are repeated here. The Plaintiff's  
9 message at issue provided:

10 It is crazy while yall [sic] got me sick, torture me in IMU, I grieve yall [sic], then  
11 yall [sic] want to write me up. This is intimidation and Harassment. Let  
Watanabe know, I will see her in Court.

12 Dkt. 65 at 13. As a result of the message, Defendant Watanabe filed a Washington  
13 Administrative Code ("WAC") 663 serious infraction notice against the Plaintiff. *Id.* at 48.  
14 After a hearing, the Plaintiff was found not guilty. *Id.* at 50-51.

#### 15 **C. DEFENDANTS' OBJECTIONS AND DECISION**

16 The Defendants maintain in their objections that the Report and Recommendation erred  
17 only in not recommending that Defendant Watanabe be granted qualified immunity. Dkt. 155.  
18 They contend that there is no showing that the Plaintiff's rights were clearly established at the  
19 time. *Id.*

20 In analyzing a qualified immunity defense, the Court must determine: (1) whether a  
21 constitutional right would have been violated on the facts alleged, taken in the light most  
22 favorable to the party asserting the injury; and (2) whether the right was clearly established when  
23 viewed in the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

1 As to the first *Saucier* step, the Report and Recommendation recommends finding that  
2 there are issues of fact as to whether Defendant Watanabe violated the Plaintiff's First  
3 Amendment rights by retaliating against him in filing a serious infraction notice against him.  
4 Dkt. 154. The Defendants do not meaningfully object to this recommendation and it should be  
5 adopted.

6 As to the second *Saucier* step, the Court must determine whether the constitutional rights  
7 asserted were "clearly established when viewed in the specific context of the case." *Saucier* at  
8 2156. For purposes of qualified immunity, "[a] right is clearly established when it is sufficiently  
9 clear that every reasonable official would have understood that what he is doing violates that  
10 right." *Rivas-Villegas v. Corteshuna*, 142 S. Ct. 4, 7 (2021). While case law directly on point is  
11 not required for a right to be clearly established, "existing precedent must have placed the  
12 statutory or constitutional question beyond debate." *Id.* at 7-8. Courts in the Ninth Circuit look to  
13 "controlling authority or a robust consensus of cases of persuasive authority to determine settled  
14 law." *Vanegas v. City of Pasadena*, 46 F.4th 1159, 1165 (9th Cir. 2022).

15 As it relates to Defendant Watanabe's claim for qualified immunity on the First  
16 Amendment retaliation claim, the Report and Recommendation points to *Entler v. Gregoire*, 872  
17 F.3d 1031, 1034 (9th Cir. 2017) as clearly established law. Dkt. 154 at 16.

18 In *Entler*, the Plaintiff, a *pro se* prisoner, filed several kites regarding various issues,  
19 including charges on his prison account and being forced to work contrary to his religious  
20 beliefs. *Entler* at 1035-1038. His kites often included a demand for action (or to stop acting)  
21 and then statements like "or I will sue you," "or I'll file criminal charges against you and have  
22 you arrested," or "I will initiate litigation . . ." *Id.* at 1036-1037. Infractions were issued against  
23  
24

1 Entler and, after hearings, he was found guilty. *Id.* Entler filed a lawsuit, in part, asserting a  
2 First Amendment retaliation claim.

3 In reversing the district court’s dismissal of his First Amendment retaliation claim, the  
4 Court in *Entler* noted that “[t]he most fundamental of the constitutional protections that prisoners  
5 retain are the First Amendment rights to file prison grievances and to pursue civil rights litigation  
6 in the courts.” *Id.* at 1039. It held that there was no “constitutional underpinning” for a  
7 distinction between formal and informal grievances (whether written or verbal) or for “the  
8 distinction between a threat to initiate litigation and the litigation.” *Id.* “[T]hreats to sue fall  
9 within the purview of the constitutionally protected right to file grievances.” *Id.*

10 The Defendants in this case object, asserting that *Entler* does not govern whether  
11 qualified immunity should be granted here. Dkt. 155. They argue that unlike *Entler*, Plaintiff’s  
12 statements were not respectful and that he used hyperbolic language. *Id.* The Defendants fail to  
13 explain why that is material. In any event, the *Entler* Court, while classifying some of Entler’s  
14 kites as respectful, do not indicate that respectful language is a requirement or even that Entler  
15 was respectful in all his kites.

16 The Defendants also argue that *Entler* is distinguishable because the kites there were  
17 actually petitions to the government for redress. Dkt. 155. The Defendants’ characterization of  
18 the Plaintiff’s message (that it was not for government redress) is, at most, an issue of fact. At  
19 this stage, the facts must be viewed in a light most favorable to the Plaintiff. *Tuuamalemalu v.*  
20 *Greene*, 946 F.3d 471, 477 (9th Cir. 2019). Qualified immunity is not appropriate if, as here,  
21 there are issues of fact. *Id.* Further, whether the message was an informal grievance under the  
22 prison’s grievance system is immaterial. “The applicability of the constitutional right to redress  
23  
24

1 of grievances does not hinge on the label the prison places on a particular complaint.” *Entler* at  
 2 1039.

3 The Defendants maintain that this case is not like *Entler* because the Plaintiff’s message  
 4 was to be relayed to Watanabe directly. Dkt. 155. The Defendants fail to point to any authority  
 5 to support their assertion (that the fact that the threat to initiate litigation was directed at  
 6 Watanabe) is a relevant distinction. Further, at least some of Entler’s threats regarding litigation  
 7 were directed at individuals.

8 *Entler* constitutes clearly established law to notify Defendant Watanabe that initiating  
 9 sanctions against the Plaintiff for threatening her with litigation was not lawful. Accordingly,  
 10 qualified immunity should be denied as the Plaintiff’s First Amendment retaliation claim.

#### 11 **D. CONCLUSION**

12 The Report and Recommendation (Dkt. 154) should be adopted. No objections were  
 13 filed regarding the other recommendations on the dismissal of Plaintiff’s remaining claims  
 14 and/or “Doe” Defendants. The Report and Recommendation has merit in all respects.

#### 15 **ORDER**

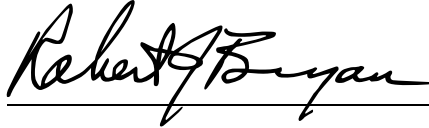
16 Therefore, it is hereby **ORDERED** that:

- 17 • The Report and Recommendation (Dkt. 154) **IS ADOPTED**;
- 18 ○ The Defendants’ motion for summary judgment (Dkt. 131) **IS DENIED**  
 19 as to the Plaintiff’s First Amendment retaliation claim against Defendant  
 20 Watanabe and **GRANTED** in all other respects:
  - 21 ▪ Except for the Plaintiff’s First Amendment retaliation claim, the  
 22 Plaintiff’s claims 2-6 **ARE DISMISSED WITH PREJUDICE**;

- Plaintiff's claims against the "Doe" Defendants, including Claim 7,  
**ARE DISMISSED WITHOUT PREJUDICE.**

The Clerk is directed to send uncertified copies of this Order to U.S. Magistrate Judge Leupold, all counsel of record, and to any party appearing *pro se* at said party's last known address.

Dated this 19th day of October, 2023.

A handwritten signature in black ink, reading "Robert J. Bryan", written over a horizontal line.

ROBERT J. BRYAN  
United States District Judge